

IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Appellant,

v.

CASE NO. SC04-451

STATE OF FLORIDA

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT ABOUT THE RECORD

Archer and two co-defendants - James Patrick Bonifay and Larry Fordham - were prosecuted in separate trials for the murder of Billy Coker during the robbery of Trout Auto Parts. Archer and Bonifay were sentenced to death, while Fordham was sentenced to life. During Archer's postconviction evidentiary hearing, the trial court granted the motion of both parties that judicial notice be taken of Archer's original trial transcript and his resentencing transcript; of Bonifay's original trial transcript, his resentencing transcript, and the transcript of his postconviction evidentiary hearing; and of Fordham's trial transcript. The State will cite to Archer's trial (from his original direct appeal record in case no. SC60-78701) as "AT," to his resentencing proceedings (from the record on appeal from his resentencing, case no. SC60-83258) as "ARS," and to the transcript of his postconviction hearing (contained in the record on this appeal) as "R." The State will cite to Bonifay's trial transcript (from the record on appeal in case no. SC60-78724) as "BT."

The State will be relying on the entirety of the various Archer proceedings. The State will cite minimally to the Bonifay proceedings, and, since Archer does not rely on the Fordham trial record, the State will not cite to it.

PROCEDURAL HISTORY

On February 26, 1991, Archer, along with James Patrick Bonifay, Larry Fordham and Clifford Barth, were indicted for murder, armed robbery and grand theft. Barth pled guilty. Archer and Bonifay were tried the same week, in separate proceedings, with Bonifay being tried first. Fordham was tried a month later. Archer was represented at trial by Brian Lang. Archer testified on his own behalf at the guilt phase of his trial. Bonifay did not testify at the guilt phase of his trial, but did testify as a State's witness at the guilt phase of Archer's trial. Bonifay and Archer were both found guilty. Bonifay testified at his own sentencing hearing; Archer did not. By a 10-2 vote, the jury recommended a death sentence for Bonifay. Archer's sentencing jury recommended death for him, by a 7-5 vote. The trial judge in each case, the Honorable Lacy A. Collier, sentenced both Archer and Bonifay to death. Fordham and Barth were sentenced to life.

Archer and Bonifay appealed to this Court, which affirmed their convictions, but reversed their death sentences and remanded for resentencing. Archer v. State, 613 So.2d 446 (Fla. 1993); Bonifay v. State, 626 So.2d 1310 (Fla. 1993). Fordham appealed his conviction to the First

District Court of Appeals, which summarily affirmed. Fordham v. State, 619 So.2d 955 (Fla. 1st DCA 1993).

The Archer and Bonifay resentencing proceedings were presided over by the Honorable T. Michael Jones. Archer was represented on resentencing by Spiro Kypreos. Juries again recommended death for each defendant, and by the same margins as previously, i.e., for Bonifay by a 10-2 vote, and for Archer by a 7-5 vote. Judge Jones resentenced each defendant to death. This Court affirmed both death sentences on appeal. Archer v. State, 673 So.2d 17 (Fla. 1996); Bonifay v. State, 680 So.2d 413 (Fla. 1996).

Archer and Bonifay each filed postconviction motions attacking their convictions and sentences. Bonifay's motion came on for evidentiary hearing in November of 2001.

Archer's amended motion to vacate, filed on or about February 22, 2000, contained some 20 claims (5R 571-654). Following a Huff hearing, Judge Jones summarily denied relief on numerous claims, while granting an evidentiary hearing on others. An evidentiary hearing was conducted on January 8 and 9, 2002.

Judge Jones received post-hearing written closing arguments from the parties, and thereafter denied relief on

the remaining claims. Archer appeals only from the denial of relief on grounds I, V and VIII.¹

STATEMENT OF THE RELEVANT FACTS

Archer's postconviction claims must be evaluated in light of the evidence presented at his trial and resentencing proceedings. Therefore, the State will summarize the relevant facts of those proceedings and then set forth the evidence presented at Archer's postconviction evidentiary hearing. The State will also briefly discuss relevant portions of Bonifay's trial and original sentencing proceeding.

A. BONIFAY'S CONFESSION TO POLICE

Bonifay's confession to Escambia County investigator Thomas L. O'Neal was played to the jury at the guilt phase of Bonifay's trial (BT 254 et seq). Inter alia, Bonifay told police that Robin Archer set the whole thing up, telling him where to go, what to do, and how to do it (BT 264). Archer wanted Bonifay to "do a hit" on a person "that worked at Trout Auto Parts," because "the guy had got [Archer] fired" and had "always been a dick" to him (BT 255, 268). The morning after an aborted Friday night

¹ These grounds were: (I) the State suppressed exculpatory evidence and presented false testimony from Bonifay at Archer's original trial; (V) newly discovered evidence of innocence; and (VIII) Archer is "innocent of first degree murder."

attempt, Archer "was bitching" at him for failing to kill the man, and told Bonifay the man would be at Trout that evening and to "do it" (BT 258-59). There would be a lot of money in it for Bonifay if he did as he was told (BT 259). After he committed the robbery/murder on Saturday night, Archer "told me that I killed the wrong person and . . . he wasn't going to give me no money or nothing like that" (BT 263).

B. ARCHER'S TRIAL EVIDENCE (GUILT PHASE)

Police were dispatched to the Trout Auto Parts on W Street shortly after midnight on January 27, 1991 (1AT 103-04). The front door was locked. A side door was open, and the clerk - Billy Wayne Coker - lay on the floor behind the counter (1AT 105, 107, 111, 119). He had been shot four times (1AT 119-20, 231). A green drop box for cash deposits and night receipts from the other Trout stores in the area had been opened and pieces of the lock lay on the floor (1AT 112). In addition, a metal cabinet containing cash drawers had been opened (1AT 110).

Trout general manager Timothy Eaton testified that all the cash (except for the "base bank") from the other Trout stores would be delivered to the Trout store on W street each evening after the other stores closed (1AT 170). The funds were dropped through a slot into an unmarked

reinforced steel box on the wall, seven feet off the floor (1AT 171). The Trout store on W street also had a petty cash cabinet under the counter (AT 172). The W store was open until midnight, but the front door was locked at 10 p.m. (1AT 172-73). One man remained, selling parts through a window without letting anyone into the store (1AT 173). A time-lapse camera hung from the ceiling, pointed at the main counter (1AT 173). There was another camera in the warehouse in the back (1AT 173). A time-lapse recorder would switch from one camera to the other every 10-12 seconds (1AT 173-74). Eaton testified that Archer had worked for Trout from November 1989 through March of 1990, and was then "terminated" (1AT 174). He was working at the W Street store as co-manager when he was fired (1AT 175). Daniel Wells had nothing to do with Archer being fired, but to Eaton's knowledge Archer was never told that (1AT 175-76).²

² Archer notes (Initial Brief at 9, fn. 5) that Eaton had testified at Bonifay's trial that Wells was not involved in Archer's firing (1BT 184). That testimony was not inconsistent with the testimony presented at Archer's trial (see above). Furthermore, it is not inconsistent with Wells' testimony that Archer believed that Wells had some responsibility for that firing. Eaton testified at Bonifay's trial that Wells was Archer's "superior" even though he was not in charge of personnel (1BT 184). Wells testified at Bonifay's trial that he was acting co-manager of the W Street store when Archer had been fired, and that "ill will" existed between the two (1BT 192). Furthermore,

James Patrick Bonifay testified that Archer came by his house one day, showed him a briefcase full of money and told him he wanted Bonifay to murder a person who would be working at Trout Friday night (1AT 126). Archer told him the "man had got him fired," and he had hated him ever since (1AT 129). He told Bonifay to take the money out of the store to make it look like a robbery rather than a hit (1AT 126). Bonifay could do what he wanted with the store money (1AT 126-27). Archer told him to go to the window and ask for a Nissan clutch; the clerk would have to go in the back room to get it, and Bonifay and his companion could come in the window and shoot the clerk when he returned (1AT 127). Bonifay testified that Archer told him to do it just before midnight, because no one would be there and only the window chute would be open (1AT 128). Archer warned Bonifay that there would be a security camera (1AT 128). Ultimately, Bonifay got the gun from Archer, who had obtained it from Kelly Bland (AT 128-9).

Wells had informed "higher-ups" in the company that Archer had a bad attitude towards customers and often failed to show up for assigned work; Wells also thought he was selling drugs (1BT 194-95). Thus, Wells clearly was justified in believing that he was "instrumental" in getting Archer fired, even if he had not actually participated in the decision. Likewise reasonable is the State's theory that Archer blamed Wells for his being fired.

Bonifay testified that Eddie Fordham drove them to Trout Friday night; Bonifay got out and walked up to the window; he asked the clerk for the part; the clerk said we don't have it, and Bonifay walked away (1AT 129). Bonifay testified that he "couldn't do it" (1AT 129). The next day Archer confronted him about not doing the job, and threatened to harm Bonifay's mother and girlfriend (1AT 130).

Bonifay testified that he called Clifford Barth and Fordham and, without saying anything about a threat, told them they had to try again (1AT 130). They had to buy more bullets, as Fordham had fired the only bullet in the gun (1AT 130-31). Bonifay testified that they returned Saturday night, and that he had decided to put on his ski mask and just rob the clerk, but the clerk turned around and saw his face, plus Barth grabbed his arm, and so Bonifay shot the clerk (1AT 131). Barth hollered "you didn't kill him," took the gun, and shot the clerk a second time (1AT 132). Bonifay donned his ski mask, got the gun back, and he and Barth climbed through the window (1AT 132). Bonifay heard something about kids, and just told the clerk to be quiet (1AT 132). Barth wasn't strong enough to cut the locks, so Bonifay took the bolt cutters, cut the two locks off the box on the wall, grabbed the

money, and threw them into a backpack (1AT 132). He wanted to go then, but Barth said, "Patrick, kill him" (1AT 132). Now the clerk had seen his face and heard his name, so he put the gun to the clerk's head and pulled the trigger twice (1AT 133). As instructed by Archer, Bonifay and Barth went around the counter, down the side wall, through a door, took a quick left, and went out another door which put them on the side of the store where no one would see them (1AT 133-34). Fordham waited for them on that side of the building (1AT 133).

They left, disposing of the checks, ski masks, and bolt cutters at some distance from Trout (1AT 134-35). Bonifay returned the gun and backpack to Kelly Bland (1AT 136).

The next day, Archer laughed at Bonifay, telling him he had killed the wrong man (1AT 135).

On cross-examination, Bonifay clarified that the clerk had "something to do" with getting Archer fired (1AT 136). Bonifay acknowledged that Archer had been fired perhaps a year before the murder (1AT 137, 139). He acknowledged that Archer had not worked in a year, and had stayed with Bonifay's mother and then with Webber and Rick Archer because he had no place to stay of his own (1AT 138). Nevertheless, he insisted that Archer had shown him a

briefcase full of money (1AT 138-39). He testified that Archer had claimed it was \$500,000, but he knew "there was no way" (1AT 139). Although Archer had no job at this time, his girlfriend did not have to support him (1AT 140).

Bonifay denied seeing the green box in a previous visit to the Trout store on W street (1AT 141-42). He denied having shot the victim the second time (1AT 143). He admitted there was no reference to a briefcase full of money in his original statement to police, but claimed he had orally told police about it (1AT 144-45). He admitted shooting the clerk in the back when the clerk turned around in response to the phone ringing (AT 145). The fact that the clerk had seen his face was "kind of" the reason he had shot him (1AT 146). He had decided not to shoot him again, until Barth said his name (1AT 146). He denied that the victim was begging for his life and for his children; all he heard was the word "kids" (1AT 146-47). He denied telling anyone that he had shot the victim while he was begging for his life and his children (1AT 147). When Barth called his name, he felt he had to kill the victim; also, he was scared of Archer (1AT 147-49).

Bonifay denied having cocked his gun in the aborted attempt Friday night (1AT 152). He did not know who the clerk was Friday night, and denied knowing that a different

man was there Saturday (1AT 152-53). He did not think he would get any of the briefcase full of money after failing to do the job Friday night; he went back the next night only because he was afraid of Archer (1AT 154-55).

Asked again about his statement to police, Bonifay admitted that, while he had told police he had committed murder at Archer's direction, he had not mentioned any threat (1AT 161-62). He denied having to ask the victim where the money was, and claimed he had told Fordham, Barth and Bland that he planned to kill the man (1AT 163).

On redirect, Bonifay testified that he was not afraid of Archer, but was afraid of his gun and his associates (1AT 164). He testified that, although Archer did not have a job, he had a source of income other than from work that generated a significant amount of cash (1AT 166).³ Bonifay did not own a 1985 Nissan, but Archer did (1AT 166). Archer gave him a piece of paper with 85 Nissan clutch written on it, to remind Bonifay what part to ask for (1AT 167). Before the murder happened, Bonifay had told people that Archer had helped him plan the robbery at Trout (1AT 168).

³ Bonifay testified at his own penalty phase proceedings that there were a "bunch of drug dealers working at Trout and they were all laundering their money through the business"; because Archer was fired, "he hated the guy" who had "messed up the whole operation" (3BT 422).

Daniel Wells testified that he had worked for Trout Auto Parts about three years (1AT 178). He knew Robin Archer, having first met him when he was a student at Coastal Training Institute (1AT 182). He met him again when they both worked at Trout (1AT 182). They were never "buddies," but worked together well enough until they were both co-managers at the W store and Wells would try to tell him things that Archer needed to be doing (1AT 183). Wells had no power to fire anyone, but he felt that he had something to do with Archer getting fired (1AT 185). Archer continued to visit the store after he got fired (1AT 185). Although Archer made no overt threats, Wells felt threatened by him (1AT 184, 188). On one occasion, they were discussing toughness, and Archer "said he wasn't worried about it, this is how he took care of his problems, opened up his jacket and had a gun on him" (1AT 184).

Wells testified that he was working at the W Street Trout on Friday evening before the murder, even though he had been ill (1AT 178-79). He had tried to get off Friday, but there was no one to cover for him (1AT 179). Five minutes before Wells was to have closed the store at midnight, someone walked up to the window and put his gloved hands on the sill (1AT 179-80). Wells was "spooked" because the man had appeared so quickly and also because he

was wearing gloves when it wasn't cold (1AT 180). He stayed behind the metal door, figuring he could slam it if the man pulled a knife or a gun (1AT 180). The man asked for a clutch disc, pressure plate and throw-out bearing for a 1985 Nissan truck (1AT 180). Wells testified that he pretended to look at the catalog and then told the man he didn't have what he needed (1AT 180-81). While he pretended to look, he thought he heard the sound of a gun cocking (1AT 181). When he turned around, the man's right hand glove lay in the window, and his right hand was down where Wells could not see it (1AT 181). When Wells told him he didn't have the parts, the man picked up the glove with his left hand and walked off (1AT 181).

Wells testified that he was still sick Saturday night, but was able to stay home because Billy Wayne Coker volunteered to close the store (1AT 182).

George Herbert Wynn testified that, on Friday before the murder, Bonifay asked him to be the driver in a planned robbery of Trout Auto parts that "might" involve killing someone (1AT 191-92). Bonifay told Wynn that Archer had asked him to do it and wanted "one person" killed because Archer had had problems with him at work (1AT 192-93). According to Wynn, Bonifay stated that Archer had told him that one person would be there, that the doors would be

locked and that they would have to go through the late night window (1AT 193). Wynn declined to be involved, and tried to persuade Bonifay not to do it (1AT 192). The next day, Bonifay called Wynn and told him he had gone to the window and asked for the part, but the clerk had heard him cock the hammer on the pistol and had closed the window (1AT 197). The day after that, he called and told Wynn he had shot the clerk in the head (1AT 195). Wynn testified (on cross) that Bonifay did not mention a "half a million dollars," or a "suitcase full of money," but had said they would split the money they got from the store (1AT 194).

Clifford Barth testified that Bonifay called him Thursday and asked him to help rob Trout Auto Parts; he told Barth that Archer had told him where the money was kept in the store and that the other Trout stores left their money there on the weekend (2AT 202-03). After Wynn rejected Bonifay's invitation to be the driver, Larry Fordham volunteered to drive (2AT 203-04). They had bolt cutters, ski masks and gloves; Archer had told Bonifay about the cameras (2AT 204). Bonifay told them they needed to find Archer to get the gun (2AT 204). They went to where Archer was staying; Bonifay and Archer walked to Archer's truck and Archer leaned inside; when Bonifay returned, he had a .32 revolver (2AT 204-05, 235).

Barth testified that they went to Trout and Bonifay went to the window, but returned, saying "he couldn't do it because the guy heard him cock the gun" (2AT 205). The next day, Bonifay called, saying that night would be a good time to do it (2AT 206). That night, they went back to Trout; Bonifay went to the window, shot the man through the window, and climbed through, motioning for Barth to follow (2AT 206).

Barth testified on cross-examination that he never shot the victim himself, and denied having grabbed Bonifay's arm or causing Bonifay to fire a shot (2AT 207). According to Barth, Bonifay never said "anything about the reason he was going in there was to shoot a guy" (2AT 211). He admitted that, in a statement he gave in early February, he had denied that Bonifay had ever said "anything about, ah, knowing where the money was" (2AT 211).

Daniel George Webber testified that he met Archer through Archer's cousin Rick Archer (2AT 212). In January of 1991, Archer had been staying with Webber and Rick Archer for about two weeks (2AT 212-13). Webber had been out Sunday, returning about 10 p.m., just when the news came on; he caught part of a news story about the Trout robbery (2AT 213). Archer, who had been asleep on the couch, woke up and asked what they had said; Webber told

them there had been a shooting at Trout (2AT 213). Archer asked him if anyone had been killed; Webber replied that he did not know (2AT 214). Archer said he thought he knew who had done it and that he had told them "how they could do it." Webber testified:

He said it would take two people. He said you need a ski mask. And he said you go up to the door at Trout. He said one person [would] order the parts, and then while the guy goes in the back room to get them the other one helps him through the box. And then he said hide and when the guy comes out of the back room shoot him, shoot him in the back of the head.

(2AT 214). The next morning, Webber told Rick Archer that Robin Archer had to leave; at his employer's suggestion, Webber also went to the police (2AT 215).

Police recovered the murder weapon, the bolt cutters used in the robbery, a blue knapsack used to put the money in, and a partial box of ammunition from Kelly Bland (2AT 219-20, 222-25, 234). They obtained the tape from the security cameras at Trout and determined that four minutes elapsed from the time the first person came through the window of Trout until they were gone (2AT 247-50).

Robin Archer testified in his own behalf. He is Bonifay's stepfather's cousin (2AT 275). He confirmed that he had gone to work for Trout in November of 1989 and had worked until February or March of 1990, when he was fired

(2AT 261-63). On occasion, he worked with Dan Wells, but they usually worked different shifts (2AT 263). They got along well; Archer never had any problems, run-ins, or verbal confrontations with Wells (2AT 263). No one told Archer or insinuated to him that Wells had anything to do with his being fired (2AT 264). Archer visited Trout on occasion after being fired; Wells was an employee he would visit with (2AT 265). He never threatened him (2AT 265). He once showed off his new gun, after Wells told him he would like to see it (2AT 265).

Archer testified that he visited Ed Bird quite often - 3-4 times a week (2AT 267). Bird worked at the Highway 29 store (2AT 267). One time, probably "before" he got back from Daytona, he went with his fiancé, his cousin Rick Archer and Bonifay to the Highway 29 store (2AT 268). Bonifay asked what the green box on the wall was for; Archer told him it was a drop box where the money was kept overnight (2AT 269). Archer had never unlocked the drop box while employed at Trout; he had only put money in it (2AT 270). All the stores had the same kind of drop box (2AT 271). He did not know what kind of alarm system any of the stores had, and had never turned the system on or off (2AT 271). The Highway 29 store had a metal box to keep cash drawers in, down by the cash register, that

usually stayed unlocked (2AT 271). At the end of the day, \$200 was supposed to be in the drawers; the rest went into the drop box at each shift change (2AT 273). Archer testified that he did not know where such a box was located at the W Street store, but he thought that it had a combination lock on it (2AT 272-73).

Archer testified that, when he returned from motorcycle school in Daytona on January 13, 1991, he stayed with Bonifay's mother and stepfather for three days (2AT 275-76). He had never threatened Bonifay's mother or girlfriend (2AT 276). Archer next moved in with his cousin Rick and Daniel Webber (2AT 277). He did not have \$500,000 or offer it to Bonifay (2AT 277-78).

Archer went to the W Street store Saturday night with Ed Bird (2AT 278). He had gone to the Highway 29 store earlier to sit with Ed while his fiancé worked at Popeye's a mile or two away (2AT 279). Shortly before 10 p.m., Archer's fiancé called and asked him to come pick her up (2AT 280). Bird was "finishing up his receipts" when Archer returned after taking his fiancé home (AT 280). Bird asked him to ride to W Street to drop off the "tickets" (2AT 281). Archer told him to follow him to his fiancé's house so he could drop off his truck, and then he rode with Bird to the W Street store to drop off the "cash receipts"

(2AT 281-82). Archer waited outside while Bird went into the store; while he waited outside, Archer saw Wayne Coker behind the counter of the W Street store (2AT 282). Archer testified he got along "real good" with Coker; Archer "liked" him (2AT 282-83). He leaned over and waved to him (2AT 283). When Bird was done, he and Archer drove back to Archer's fiancé's house to get his truck (2AT 283). Archer drove back to his cousin's house (2AT 284). Rick came in while he was watching television and said he was going to stay with his girlfriend in Milton; Webber was gone, so Archer asked if he could bring his fiancé over to spend the night (2AT 284). Rick gave him permission, and Archer drove back over to his fiancé's house, picked her up, and came back by way of W Street (2AT 285). They passed by the Trout store on W Street at about 12:30 a.m.; Archer saw a "bunch of cop cars and ambulances around and they had the yellow rope around the building" (2AT 285). He slowed down as he drove by, but did not stop (2AT 285).

The next evening, Webber came in and turned on the television and Archer heard something about Trout (2AT 286). They talked about it; Archer told him that it "would be easy" to rob, because Trout was "unsecure" (sic) (2AT 287). Archer did not mean anything by it (2AT 288). He told Webber that he could tell someone how to rob it, that

would be "easy," but he never said he actually had told someone how to rob the place (2AT 288).

Archer testified that he did not understand why Bonifay would have implicated him, but, two or three days before the murder, Archer had refused to take Bonifay to Barth's house to buy drugs, because his tag had expired and he did not "need to be on the highway" (2AT 290-91).

On cross-examination, Archer admitted that Bonifay knew that he and Wells did not get along (2AT 292). Asked how Bonifay could have known that if he and Wells "got along" as Archer claimed they did, Archer answered that "Wells is an air-head, he's kind of loose in the head and I pick at him and call him names" (2AT 293).

Archer testified that he and Rick Archer had told Bonifay what the green box was in the Highway 29 store, and had told him that all the stores had the same kind of box (2AT 294-95). As far as he knew, money was kept overnight at the drop box in the Highway 29 store; all Bird was doing the night of the murder was dropping off "cash receipts" (AT 295). No cash was delivered, as far as he knew (2AT 296). He claimed it was "news" to him that cash was being delivered that night to the W Street store, but he knew "now" that cash was taken there; asked when he learned that, Archer answered, "Well, as a matter of fact I think

it was the night of the 26th," when Bird told him (2AT 296). It was just a coincidence that he was at the W Street store seeing cash delivered from the Highway 29 store, and it was another coincidence that he happened to drive by the W Street store shortly after the murder (2AT 296-97).

Archer claimed to have a "meek and mild" reputation; asked why then Bonifay would have sought his assistance getting drugs, Archer answered that Bonifay only wanted him to take him to get drugs (2AT 297). Archer claimed again that he had refused to do so because his tag was expired, but he admitted that his tag had expired in October of 1990 and that he had driven to Daytona and back on expired tags (2AT 298).

Archer admitted that he knew the store alarm would not be turned on until after the clerk left; as long as the clerk was there, the alarm would be off (2AT 299). He further admitted telling Webber "I thought I knew who did it" (2AT 300). Asked why he thought he knew who had committed the crime, Archer answered that he "assumed" it was Bonifay because Bonifay had just come back from Mississippi for stabbing a man during a robbery and had "been bragging about wanting to kill somebody just to see what it was like" (2AT 300). Archer admitted that when he

first heard about the robbery, he did not know that anyone had been killed, but thought Bonifay had done it because he knew someone had been shot (2AT 301). He denied knowing that Bonifay was "fully capable" of killing someone; Archer "didn't think he was that cold hearted" (2AT 301). He denied telling Webber that he had told anyone how to do it, only that he "could" have told them; Webber misunderstood what he was saying (2AT 301-02). He "could" have told them to wear ski masks (2AT 302). He "could" have told them to cut the locks off; "Anybody knows that" (2AT 302). He "could" have told them to have the clerk go to the back (2AT 302). He could have told them to get a part for a Nissan pickup truck; although the clerk could get some things "right there," many items, like clutches and "certain alternators, certain starters," would require a trip to the back (2AT 302-03). Archer did not know all the parts the clerk would have to go in the back for, but he knew a "couple" of them (2AT 303). He was not "sure" about a part for a Nissan pickup, because they "changed the store around so often" (2AT 303).

Archer denied ever getting a gun from Kelly Bland, or giving it to Bonifay (2AT 303). Bonifay was accusing Archer to "take some of the heat off him" (2AT 304). Archer agreed that this was a "story [Bonifay] would make

up after he got caught (2AT 304). Asked why Bonifay would have told Barth that Archer was involved before the crime occurred, the following transpired:

A. Why not tell people before so that you got a good -

Q. Plan to get caught, right?

A. Well, I wouldn't say get caught. Just plan it so if you do get caught you got somebody to burn for it.

Q. And George Wynn, he tells George Wynn yeah, Robin set it up, told us how to do it, told us how to get in and out, planning to get caught and then he can use that later on, right?

A. You don't plan to get caught.

Q. You don't. Well, then why before this happens would these people say he said you set it up beforehand?

A. Because he knew I worked there.

Q. So?

A. So.

(2AT 304).

Patricia Gibbs, Archer's then fiancé, testified that she had been dating Archer two years and that Archer had never mentioned having any difficulties with Dan Wells (2AT 311-12). To her knowledge, at the time of the murder, Archer had no money (2AT 313). She testified that Archer owned a 1983 Nissan truck that he loved (2AT 313-14). She worked at Popeye's during this time, and Archer would

normally visit Ed Bird at the Highway 29 Trout store while she worked (2AT 314). She was working at Popeye's the evening of January 26 (2AT 316). At 8-9 p.m. that evening, she called Archer at the Highway 29 store and told him to come get her (2AT 317). He took her home and told her he was going back to Trout (2AT 318). Her home is only half a mile from the Highway 29 Trout store (2AT 318). Later, he came by, dropped his truck off, and told her he was going with Ed Bird "to take the *money* to W street" (2AT 319) (emphasis supplied). He returned later for his truck, kissed her goodnight, and left (2AT 319-20). She thought that would be the last time she would see him that evening, but between 11 and 12 p.m., Archer returned, picked her up, and they drove to Rick's house (2AT 320). On the way there, they went down W Street; she saw "four or five cop cars" and, she thought, two ambulances (2AT 320). They did not stop, but just kept going (2AT 321). They went to Food World to get a Coke, and then went home (2AT 321). Gibbs testified that she heard Bonifay threaten Archer after Archer refused to take Bonifay to get drugs (2AT 322).

On cross-examination, Gibbs testified that the gun Archer had shown to Wells was a nine millimeter that Archer had recently bought at Mike's Gun Shop for \$416, which he paid for by credit card (2AT 324-25). She admitted

knowing, when they drove by Trout and all the police cars were there, that Archer had been there only an hour and a half earlier (2AT 327).

Ed Bird testified that at the time of the trial he had been working for Trout Auto Parts some three and a half years (2AT 330-31). Between February of 1990 and the night of the murder, he saw Archer "roughly" four times a week, because his girlfriend worked nearby (2AT 331). On the night of the murder, Archer visited Bird at the Highway 29 store (2AT 332). As he had done on "numerous occasions," Archer rode with him to the W Street store to drop his "deposit" off, including cash (2AT 333-36). It was nice to have company "when you carry that much money and don't carry a gun" (2AT 336) (emphasis supplied).

On cross-examination, Bird testified that Archer knew that cash went to the W Street store, and knew it before the night of January 26 (2AT 338).

Rodney Archer, Robin Archer's cousin, testified that he was employed by Trout Auto Parts for six months in 1990, after Robin Archer had been fired in March (2AT 339-40). Rodney described the W Street store as the "main warehouse" where all the parts went out from and where "all the stores brought their deposits at night" (2AT 340, 342). Although the front door was locked at night, many times the clerk

would let in his friends just to keep him company (2AT 341). Occasionally, one of these friends would come through the window just to scare the clerk (2AT 345). Rodney was unaware of any hard feelings between Robin Archer and Dan Wells (2AT 346). However, he did recall that Wells told him he thought Robin Archer might have believed that Wells had something to do with Archer getting fired (2AT 346).

Richard Archer, another of Robin Archer's cousins, generally known as "Rick," testified that he spent Saturday night with his girlfriend; when he returned to the house Sunday morning, Archer said nothing to him about Trout (2AT 350-53). However, Monday morning, Webber told him that Trout had been "broken into" and reported to Rick Archer that Robin Archer had told him he thought Bonifay had something to do with it because Robin Archer had told him how they could get in (2AT 356). Webber said if Robin Archer was involved, he wanted him to move out (2AT 356).

On cross-examination, Rick Archer testified that money from the other stores was kept at the W Street store; Ed Bird "always mentioned I got to get the money together and take it to the W Street Store" (2AT 357). The money was not kept overnight at the Highway 29 store (2AT 357). He never told Bonifay that fact or anything about security

cameras; he only told Bonifay that the box on the wall of the Highway 29 store was a drop box where the money was put (2AT 358). Rick Archer had never been to the W Street store himself and did not know how to get out the back (2AT 358-59).

In his closing argument, Assistant State Attorney P. Michael Patterson told the jury:

The State presented several witnesses who indicated to you that there was a concerted plan to rob the Trout Auto Parts store on North W Street. This plan was somewhat sophisticated from its detail. This is . . . a classic inside job. What do we look at to determine is it an inside job? Well, you look at whether or not the way the store was robbed, just without any other information, just the way it was robbed, would indicate this person may have had some information that was not readily available to the public.

Well, we have the videotape of this crime, and we know that the two individuals that actually went in that store were in the store for less than four minutes. Four minutes. In and out. We know that they went in the store through a little [chute]-type window, and we know they went out through a back door into a hallway out another back door. We know that they had the car parked by this back door, this side door actually, that led off the hallway. We know that they carried bolt cutters into the store with them when they went in. And we know that they wore ski masks to defeat the effect of the security cameras. Classic inside job

Well, it turns out that you discover who committed the crime, two 17 year olds committed this crime, killed Mr. Coker. So the investigation continues, both 17 year olds . . . said well, yeah, the information came from Robin

Archer. That's how we did it. Well, maybe they're trying to help themselves. What other information do we have? Well, Daniel Wells comes forward and he tells us that there's bad blood between Daniel Wells and Robin Archer, ill will. Have they ever had a fight? No, they've never had a fight. Has he ever threatened you? Not in words . . . but I've been threatened by him. He said he didn't have to use words.

Well, did Robin Archer provide this inside information? We know he did. Then we learn from one of the 17 year olds . . . that the gun that was used in this robbery actually came through Robin Archer

Well, let's look a little further. What else do we know? Well, lo and behold, we know that Robin Archer told Daniel Webber from his own mouth, told him I told him how to do it. I know who did that. I told him how to do it. . .

[The defense argues that] Patrick Bonifay had this grudge against the defendant . . . , so when he was caught he was going to try to blame it on the defendant. . . . He told you that the defendant first offered him money, big deal was made out of \$500,000. You saw Mr. Bonifay's sophistication on the stand. . . . He said it was \$500,000 and he . . . believes to this day it was \$500,000. He doesn't know what \$500,000 looks like. . . . He was showed some money. He was told by an older, more sophisticated friend of his, pull this off. . . .

[Bonifay was a] loaded gun . . . pointed at Trout Auto Parts, and that loaded gun killed Billy Coker because of Robin Archer. . . . Patrick Bonifay went to Trout Auto Parts on Highway 29 and looked up at the box and said, oh, that's a drop box, six months, nine months before this happened. . . . Did he know that the money was gathered up and taken to W Street? Did he go with the man that made the drop, the cash drop the night Billy Coker was killed to the W street store and watch it being dropped in the box? Did he take the stand and lie to you and tell you, as

the defendant did, I had no idea money went in that box[?] Yeah, I worked there and I had done that drop. I had no idea money. The night this happened is the first time I learned that money was put in that box. His good friend Mr. Bird said something a little different. His good friend Mr. Bird said he's gone with me many times to make that drop. Well, did he know that cash was being - of course, he did. He's made the drop before. He's been with me many times. Of course he knew there was cash in the drop. I mean, he kind of answered it like I was asking a crazy question. But the defendant said oh, the 26th is the first time I ever knew about the cash. Why? Because that's the kind of inside information that points the finger at one person.

The defendant testified that he had a beautiful relationship with Daniel Wells in his colloquy with his attorney. A beautiful relationship with Daniel Wells. But when we started asking a little closer questions about that we learned that Daniel Wells was an air-head and I enjoyed picking on him. That was his beautiful relationship. You got a glimpse of the man that Patrick Bonifay knew when he testified, because when I started asking him about Daniel Wells I think you could see the look in his eye and the change of expression and this acting job for just a minute. And you saw a glimpse of what Patrick Bonifay saw when he was told I wanted him dead. Because that's what the defendant wanted. That's what he was going to get out of this. He was going to get Trout Auto Parts robbed, Trout Auto Parts that fired him. But he was going to get the man dead.

You know, it's interesting because Daniel Webber said a couple of things that were just amazing for someone who did not know what happened at Trout. Isn't it amazing that he talk[ed] about ski masks[?] I mean, not Halloween masks, not stocking masks, not all the different ways you could disguise yourself, but lo and behold within hours of this happening the defendant is telling Daniel Webber wear ski masks. That's what I told him. And lo and

behold we learn that he had a plan about asking for a part to send the man in the back. Do we know what happened Friday night? A part for a Nissan truck. Daniel Wells remembers it as a 1985 Nissan truck. Well, it's not quite perfect. The defendant has an '83 Nissan truck. The truck was a Nissan. It's a part that has to come out of the back. That's a strange coincidence.

It's a strange coincidence that on the night Billy Coker is killed the defendant makes a cash drop on Highway 29 [sic (the W store)]. It's a stranger coincidence that on the night that Billy Coker was killed he drives by Trout Auto Parts a little bit after midnight and sees cop cars all around him. You heard the testimony from his cousin, I think it was, that Billy Coker and the defendant were good friends. He would never do anything that could result in harm to Billy Coker. And the defendant just happens to be driving by the Trout Auto Parts an hour, hour-and-a-half after he has seen Billy Coker at Trout Auto parts and the place is surrounded by police cars, it's within a few minutes of closing time. So, does he stop and see what happened? Does he turn to his girlfriend and say, gosh, I hope Billy is okay?

What did she say? He said nothing. He didn't say a word. They just drove by. This is a place he was at an hour, hour-and-a-half before, dropping off money, good friend is there. He just drove on by. Didn't call anybody. Didn't go home and ask some questions. The next day, the next day he's with his cousin and this is his cousin that defense counsel says, you know, he tells everything to. Does he tell his cousin anything about driving by Trout Auto Parts the last thing he does presumably before he goes home and goes to bed and sees police cars all around the place. I asked Patty, I said how many. She said there were a bunch of them. An ambulance. She saw an ambulance there. Police cars on the side of the building. Does he say anything to him, gosh, we went by Trout and I just made a money drop there and saw an ambulance? Why? Why doesn't he say anything to

his girlfriend? Why doesn't he say anything to his cousin? Because he knows exactly what is happening and he knows who did it and he knows why they did it. He knows how they got in. He knows how they cut the locks. He knows how they wore ski masks. He knows how they got out of the store.

There was one other thing that Robin Archer told Daniel Webber. He said in his plan, when the man comes back to shoot him in the head. That's what Robin Archer, out of his own mouth, told Daniel Webber. And you have to understand when Robin Archer is telling this it's not like he stopped and realized and said oh, this man has been shot in the head. He didn't know. He hadn't seen it on the news. He just described to Daniel Webber what he told them, how do to it.

(2AT 368-78). In his rebuttal argument, Patterson disputed the defense argument that the State's whole case rested on Bonifay and his testimony was incredible. Patterson discussed again the testimony of Clifford Barth, Daniel Webber, and Daniel Wells (3AT 403-05). Then, he observed:

There's only one person in this case that has a more incredible story than Patrick Bonifay and that's the defendant, Robin Archer. Robin Archer was very careful. He sat back and he made sure he had an alibi and he made sure that he was with his girlfriend right when it happened, went and picked her up to make sure he was with her at the hour that this was to have happened. He made sure the money was at the store. He made sure Patrick Bonifay understood about the money under the counter.

Now, you used your own best recollection of the evidence, but when the defendant's cousin was testifying I asked him point-blank did you tell [Bonifay] anything else other than about the drop box, that that's a drop box. No. Tell him about taking the money to W Street? No. Tell him

anything else? No. Where is this Patrick Bonifay heard about the safe under the counter? Where is the testimony about that? Where is the testimony about the keys to the drop box? There were no keys to the drop box there. That's the whole purpose of the drop box, it's secure. The keys were not there. That's why he needed the bolt cutters. And who know that? Robin Archer.
. . . .

Now, much is made about . . . Patrick Bonifay seeing a different man there. Patrick Bonifay didn't know who he was supposed to kill. Patrick Bonifay was sent to kill the man that was working there. He didn't know Daniel Wells, never seen him before. He was sent to kill the man that was working, the night clerk. And I submit to you that [Bonifay] had no idea Billy Coker was working that night. We hear that from one person and one person only. . . . There's not but one person that's testified, oh, I knew it was Billy Coker there. . . .

(3AT 405-07).⁴

C. ARCHER'S RESENTENCING PROCEEDINGS

Daniel Wells, George Wynn, and Daniel Webber testified at the resentencing in a manner essentially consistent with their trial testimony (2ARS 237 et seq, 258 et seq, 269 et seq). Other witnesses (Al Taylor, Joseph Hall and Gary Cumberland) testified consistently with their trial testimony about the injuries to the victim and the identification of the murder weapon (2ARS 274 et seq, 316 et seq, 322 et seq).

⁴ This "one person," of course, was Robin Archer.

Clifford Barth also testified, once again describing how he had been with Bonifay when the latter had obtained a gun from Archer to rob Trout (2ARS 279-80). He again described their preparation, including obtaining bolt cutters (for the locks on the money box), ski masks (for the security cameras) and gloves, based on information furnished to them by Archer (2ARS 280-81). He again described the aborted attempt Friday night, and the robbery/murder the next day (2ARS 281-87).

Barth was cross-examined about the negotiated plea he entered following the conclusion of trials for Bonifay, Archer and Fordham - trials in which he had testified for the state in the hopes of receiving a lesser sentence (2ARS 288-90). He testified once again that Bonifay had never said they needed to shoot or kill anyone, only that he might shoot someone if he had to (2ARS 290-91, 296-98). Bonifay did tell him there would be a lot of money in the store - probably \$20,000 (2ARS 295-96). Barth testified that Bonifay thought he was "pretty macho" and "pretty tough" (2ARS 298). He testified that Bonifay had attempted before his own trial to get Barth to say that Bonifay was high when he committed the murder, and also that Archer had threatened him (2ARS 300). Barth had refused to so

testify, because these were lies (2ARS 300-01). Bonifay was a leader and seemed in complete charge (2ARS 302).

James Bonifay was called, but refused to testify even with a grant of use immunity (2ARS 304-10). The State successfully moved to read his prior testimony to the jury (2ARS 330 et seq).

Two defense witnesses testified: Jennifer Tatum (nee Morris) and Archer's mother Frances Archer.⁵ Tatum testified that Bonifay had told her he had killed the victim because he had seen his face (3ARS 409-10). Archer's mother testified that her son had never been convicted of a crime and that he loved cars (3ARS 415-16). He had never complained about Dan Wells to her, or expressed any bitterness about having been fired from Trout (3ARS 416-17). He had taken a loan to go to motorcycle school (3ARS 417-18). He was "real excited" about going to school, but had returned before he finished to bring his girlfriend home (3ARS 418). He had only gone to school through the seventh grade, but had tried to improve himself by studying welding and drafting (3ARS 420). He had worked

⁵ Archer had retained the services of two mental health experts, but ultimately neither testified at the resentencing. They did testify at the postconviction evidentiary hearing. See Part C, *infra*. No issue is raised on appeal about trial counsel's failure to call either of these mental health expert witnesses at resentencing.

almost two years as a draftsman for a truss company (3ARS 420). He was close to his grandparents, and had taken the death of his grandmother "hard" (3ARS 420-21). Her son was not mean-spirited; he was a kind, caring and likable person who always had a smile on his face and had never been in a fight (3ARS 421).

D. ARCHER'S POSTCONVICTION EVIDENTIARY HEARING

Three mental health experts testified: Dr. Earnest Bordini for the defense; Dr. James Larson and Dr. Karen Hagerott for the State. Because no issue of mitigation or ineffective assistance of counsel is raised on appeal, the State will just note briefly that Dr. Bordini concluded that Archer had right frontal lobe deficits (6R 801-02) not rising to the level of statutory mental mitigation (6R 846), while Dr. Hagerott, who had conducted a neuropsychological evaluation of Archer in 1993 at Dr. Larson's request (6R 898), found no indication of frontal lobe syndrome, and nothing that would rise to the level of a statutory mitigator (6R 901-02). Finally, Dr. Larson, who agreed that no statutory mental mitigation existed, testified that much of what he found in his defense-requested evaluation of Archer in 1993 would not have been helpful to the defense (6R 861, 866), including the presence of "numerous" antisocial and narcissistic

features, such as lack of remorse, refusal to accept responsibility for his actions, and a history of substance abuse (6R 861-62). In addition, the MMPI testing indicated that Archer was "irritable, sullen, argumentative and resentful of authority" (6R 865). Dr. Larson had some concern about presenting such evidence in light of the defense posture that Archer "didn't do it" and the State's theory that Archer's motive was revenge (6R 862, 865).

Sheriff's detective Brooks Sanderson testified that he was assigned to investigate a burglary at All Pro Sound, committed on December 21 or 22, 1990 (7R 1136-37). Sanderson had no "real leads" in the case until after the Trout murder a month later (7R 1138). Detective Tom O'Neal had interviewed Kelly Bland and turned over to Sanderson a statement made by Bland admitting his involvement in the All Pro Sound burglary (7R 1138). Sanderson did not arrest Bland because O'Neal had indicated to Sanderson that Bland had been given immunity (7R 1138, 1140). After receiving Bland's statement, Sanderson interviewed other persons who may have been involved, including Bonifay (7R 1141). Bonifay told him they had used Bland's truck; Wynn waited at the truck, acting as a lookout, while Bonifay, Bland, Barth and Eric White entered the store (7R 1143).

Sanderson was not an investigator in the Trout murder case, and was not involved in that investigation at all except that he did a composite sketch (8R 1163). There was no trial in the All Pro Sound case (8R 1164). Bonifay apparently pled guilty in September of 1991, Barth pled nolo contendere in June of 1991, and Wynn received a deferred prosecution agreement in October of 1992 (8R 1164-65).

Detective Thomas O'Neal testified that Bland received use immunity with regard to the Trout robbery/murder (PCT 418). Bland was not given immunity as to the All Pro Sound case, but was not arrested either (8R 1168). O'Neal took a statement from Bland about the All Pro Sound case subsequent to his investigation of the Trout murder; it was not included in his Trout case file (8R 1172). O'Neal saw nothing in this statement that was relevant to the Trout Auto Parts case (8R 1172). O'Neal had no reason to believe that anything in this statement would have been helpful to either Archer or Bonifay in the Trout prosecution (8R 1173).

Mike Patterson was the original trial prosecutor (7R 1073-74). His decision to call Bonifay as a witness at the Archer trial was made "very shortly before the trial," after Bonifay had been convicted in his trial (7R 1076,

1115). Patterson's recollection was that Bonifay's attorney approached him and said Bonifay wants to testify (7R 1115). There were no negotiations and no deals with Bonifay in exchange for his testimony (7R 1116). Patterson did not discuss Bonifay's testimony with him beforehand; the only recollection he had of a conversation with Bonifay "was very briefly in a hallway with his attorney present where virtually no substance was discussed at all" (7R 1077). Patterson was not sure what Bonifay was going to say; he learned what Bonifay would say the same time the jury did (7R 1116).

Although Patterson "would never try and mislead the court or the jury with false testimony," he could not say that "every word of every witness" he had ever put on the stand was true (7R 1078). It was not uncommon, particularly where co-defendants testify, that part of their testimony is credible and part is not (7R 1078). Patterson would not knowingly put on false testimony, but he would put on testimony knowing that the "greater weight" of the evidence indicated that specific facts were "not so," if the "overwhelming importance of other facts" warranted it; the "nature" of testimony is that "some of it fits the facts and some of it doesn't" (7R 1078).

Patterson thought that Bonifay's testimony was in the main accurate, but that he had "honed" what had really happened in an effort to reduce his culpability (7R 1106). Patterson was aware of no testimony or other evidence that Bonifay's testimony about Archer's alleged threat was false, but he thought that the "greater weight" of the evidence indicated that the threat had not occurred, or at least that it was not why the murder had been committed (7R 1106, 1121-22). Patterson thought "on balance" that Bonifay's testimony about the threats helped the defense because it was not believed by the jury (7R 1079-80). In fact, defense counsel had spent a "great deal of time focusing on that," not because "he thought it was damaging," but because he thought it helped his case (7R 1080-81).

Patterson did not call Fordham as a witness because, in his judgment, the "overwhelming substance" of his testimony was false (7R 1079). Patterson did not recall making Fordham any kind of offer or asking anything of him except to tell the truth (7R 1088). Patterson would not have told Fordham he was not "satisfied" with his story, but he did clearly communicate to him that he did not think Fordham was not being "substantively truthful" (7R 1088). Patterson did not tell Fordham there were certain things he

wanted to know about the Archer or Bonifay case (7R 1088-89). Patterson "absolutely" never presented to Fordham any scenario about a "naked lady" and an "old chair" (7R 1089). Patterson did not think he ever suggested to Fordham that he was "forgetting" anything, because Patterson thought that Fordham was being "affirmatively disingenuous" rather than forgetful (7R 1089).

Patterson had no recollection of having any police records from Mississippi about the robbery Bonifay had participated in there (7R 1100-01). If he had them, he would have turned them over to the defense (7R 1101). Patterson did not recall whether or not he knew that Webber had a prior record; he did not, as a matter of routine, do a records check on every witness (7R 1102-03). Patterson could not say whether he knew about the All Pro Sound case at the time of trial (7R 1104). If he had known, he would have made defense counsel aware of it (7R 1105).

Clifford Barth testified in all three trials - Bonifay, Archer and Fordham (PCT 233). Bonifay's trial was first (7R 984). He testified in that trial that, while he and Bonifay were in detention together after their arrest, Bonifay had tried to recruit him to lie and say that Archer had paid Bonifay to commit murder and also to say that Bonifay was high when he committed the murder (7R 984).

However, Barth declined to lie; his testimony about Archer's involvement never changed (7R 985-98).

Larry Fordham testified, in effect, that, before any of the trials began, prosecutor Mike Patterson tried to get him to agree to perjure himself - to testify in the Archer and Bonifay trials that he saw an exchange of money between Archer and Bonifay, even though Fordham did not see such an exchange, and to testify about conversations between Archer and Bonifay even though Fordham had witnessed none (7R 1005-07). Fordham testified that Patterson told him he was not saying what Patterson wanted to hear; Patterson told him that if there was a chair and a "naked lady" in the room, he would remember the naked lady, his point being that "the chair was in the room," but Fordham was distracted by other things (7R 1007). Further, when Fordham tried to tell Patterson that Bland had threatened him, Patterson "jumped" out of his chair and called Fordham a "liar" (7R 1009-10).

Archer's original trial counsel Brian Lang testified that "pretty much" all of Archer's co-defendants had given statements to the police; the state's case was "pretty strong" (7R 1028). However, Archer was not present at the scene of the murder, and there was no physical evidence tying him to the crime; Lang's basic defense strategy

therefore was that Archer was not involved "in any way whatsoever" and that Bonifay had named Archer as a "scapegoat" (7R 1029). He would have considered presenting evidence about the Mississippi incident and the All Pro Sound burglary, although Archer had in fact brought up the Mississippi incident in his own direct testimony (7R 1030). Lang could not recall whether he and Archer had discussed the Mississippi case before he testified (7R 1037). The Mississippi case might tend to show that Bonifay was capable of doing the Trout crime on his own, but on the other hand, Bonifay had already impeached himself by admitting in his testimony that he was a robber and a murderer (7R 1037). Lang was hesitant to associate Bonifay too closely with Archer; he preferred to put as much distance between the two as possible and so would have to consider whether or not to explore Archer's knowledge of Bonifay's past (7R 1037). Lang did not recall anything about the All Pro Sound case, but he testified that, while it might have been beneficial to the defense to have shown Bonifay's involvement, to the extent that it showed that Bonifay was capable of committing crimes on his own (7R 1030, 1038, 1055), on the other hand, showing that Bonifay had a "bad record" might also corroborate the State's theory that Archer had solicited this bad person to do his

dirty work for him (7R 1055). In fact, the State had characterized Bonifay as a "loaded weapon" in its closing argument, and Lang did not want to load that weapon any further (7R 1055-56).

Lang sat through a "good portion" of Bonifay's trial because he "knew it was going to parallel with what we had" (7R 1040, 1051-52). He could not specifically recall being present when Barth testified at Bonifay's trial that Bonifay had asked him to lie about the threat and the money, but Lang knew about the incident (7R 1044). Lang did not elicit such testimony in Archer's trial, but Barth "had already contradicted a lot of what Mr. Bonifay had to say," and further exploration about the threats and money might have "bolstered" Bonifay's testimony (7R 1045).

Lang was unaware that Bland had been given immunity for any crimes, but since Bland did not testify, Lang did not know how it would have been helpful to have known that (7R 1035). Lang was not sure if it would have been helpful to "cast doubt" on Webber by going into any of Webber's prior criminal charges; what Webber testified to "quite frankly kind of helped what Mr. Archer said in his testimony" (7R 1035). Further, Archer was staying with Webber, and Lang again was reluctant to associate Archer

with criminals, especially since Archer had no prior criminal record himself (7R 1059).

Lang did not consider Bonifay's testimony about Archer's threat to be damaging testimony; Lang explored that during Bonifay's cross-examination and "quite frankly I didn't put any credence in it, [and] I don't think anybody else did" (7R 1039). Lang thought Bonifay's testimony about the threat "hurt" Bonifay's credibility with the jury because "it was pie in the sky and nobody believed it" (7R 1040-41).

Spiro Kypreos, Archer's resentencing counsel, testified that, in preparation for Archer's resentencing, he reviewed all the trial transcripts in the case (6R 919). His recollection was that trial prosecutor Mike Patterson had portrayed Bonifay as more of a thug in Bonifay's trial than in Archer's (6R 920). Kypreos was unaware of any pending charges against Webber and did not recall receiving any material about Bonifay's Mississippi case (6R 924-26).

Kypreos requested a psychological evaluation because he wanted to explore all alternatives (6R 928). After the evaluation, he talked to Dr. Larson and Dr. Haggerot, trying to "get a handle on where they were" (6R 928). Any nonstatutory mitigation was of less concern to him than statutory mitigation; although he thought that if he

"couldn't beat" the CCP aggravator, Archer's chances were slim anyway, he at least needed to "get to the statutory mitigator level" to have a chance to offset that (6R 928). Dr. Larson, who Kypreos described as "very experienced in this area," reported that there were no statutory mitigators (6R 929). Kypreos described Archer as a "hands-on type defendant" (6R 954). Archer wanted to know what was going on in his case, and was very alert and aware of the process and what he was up against (6R 955).

Kypreos testified that his theory of defense at resentencing hinged on the CCP aggravator; in his view, the only way the State got that aggravator "was either that Mr. Archer had a contract out for Mr. Wells and Mr. Coker was killed by mistake or that there was a robbery planned from the beginning that would include killing someone" (6R 933). So, if he could "beat" the state on CCP, then what the state had left was not a death penalty case (6R 933). His strategy, then, was to show that Bonifay did this crime independently of Archer (7R 959).

Kypreos acknowledged that Archer knew about Bonifay being involved in a Mississippi stabbing (6R 938). He specifically discussed with Archer whether or not to go into it (6R 939). One reason Kypreos did not emphasize it was that he did not want to emphasize that his client was

associating with thugs (6R 945). Kypreos asked, rhetorically, "if you wanted someone killed, what kind of person would you get, a boy scout or would you get somebody who is willing to use violence?" (6RT 946). In his view, "A guy who is going to stab somebody has got what it takes to kill" (6R 946).

Kypreos was aware from prior transcripts that Bonifay had solicited Barth to testify the Bonifay was high at the time of the murder and that Archer had threatened him; in fact, he cross-examined Barth about that (6R 942-43).

Kypreos probably would not have cross-examined Webber about his criminal history or his probation status if he had been aware of it; for one thing, he would not have wanted to establish that Archer's roommate was another criminal (6R 945).

Kypreos did not know specifically about the All Pro Sound burglary (6R 946). He had discussed with Archer the fact that Archer thought that Bonifay had committed other burglaries in the area, but he did not recall Archer mentioning All Pro Sound specifically (7R 1019). That burglary might have been useful to impeach George Wynn, because it would show that he had been Bonifay's partner and would have a reason to lie for Bonifay about the extent of Archer's involvement (6R 947-48). But, in Kypreos'

view, it would neither have hurt nor helped Archer to let the jury know that Bonifay and Barth had been involved (6R 947-49).

The final witness was James Patrick Bonifay, now known as Nabiyl Taqqi Ya'qub Musaaleh (8R 1186). Bonifay testified that he had been familiar with the Trout store on W Street (8R 1187). He was also familiar with the Trout store on Highway 29 (8R 1187). He had never talked to anyone except Robin Archer about anything in any of the Trout stores (8R 1187). He had talked to Archer about the W Street Trout store, about a week before the murder (8R 1187-88). Archer told him the W Street store would have a "considerable" amount of money because it was a "drop-off" for all the Trout stores in the area (8R 1188). Archer also told him "how the clerk might go to the back," and that "there was an exit on the side of the building" (8R 1189). Bonifay did not "come straight out" and tell Archer he was planning to rob the store, but he did not think that Archer was "clueless" about the reason for Bonifay's interest (8R 1189).

Archer did tell Bonifay that he had a problem with someone who worked at Trout; they were at Trout on day and Archer "came out and got in the truck after taking care of something inside the Trout, and he made a comment about the

guy behind the counter," saying something "along the lines of he's an asshole or he's a jerk" (8R 1189-90). However, Bonifay testified, Archer never told Bonifay he wanted him to kill anyone (8R 1190). Nor did he ever offer Bonifay any money to do anything at Trout (8R 1190). When Bonifay was arrested, he said these things trying to shift the blame onto Archer (8R 1191-92).

Bonifay admitted that he was planning the robbery at least a week in advance (8R 1193). He also realized that the only way he could get money was to rob the place while the clerk was still there (8R 1193-94). However, he denied intending to shoot the clerk; he claimed he "panicked" (8R 1194).

Bonifay admitted that Archer had given him information about how to carry out the crime (8R 1194-95). For example, they wore masks because Archer told them about the cameras, as well as some of the other security measures (8R 1199-1200). Archer also told Bonifay what kind of part to ask for to get the clerk to leave the window and go to the back (8R 1201).

Bonifay acknowledged telling the police shortly after the police that the "wrong man" had been killed (8R 1202). Asked how he could have known the "wrong man" was killed if Archer had not told him so, Bonifay said that he "was

informed that on a certain day, a certain person would work there" (8R 1203).

SUMMARY OF THE ARGUMENT

Archer presents three issues on appeal:

1. The record supports the trial court's rejection of Archer's claim of newly discovered evidence of innocence. Bonifay now says that Archer did not solicit him to rob Trout or to murder its clerk. However, he acknowledges, even now, that he had obtained all necessary information and a detailed plan to commit the robbery from Archer, and that Archer had a problem with one of the Trout clerks. Bonifay cannot adequately explain why he waited eleven years to recant his trial testimony. Nor can Bonifay explain why he would have told others, before the crime even occurred, that Archer wanted someone killed and had recruited Bonifay to commit robbery and murder. Nor can Bonifay explain how he would have known that the wrong man was killed unless (a) there was a plan to kill and (b) Archer told him that the man he killed was not the man he was supposed to kill. Aside from the general non-credibility of Bonifay's self-serving recantation, the fact remains that the crime in this case was obviously an "inside job," committed by one who had been told which

store would have the money, when and how to enter the store, where the money was in the store, how to get the money out, how to avoid the store security, how to exit the store without being seen, and how to eliminate the only possible witness. Archer clearly was that inside man, as shown by considerable testimony and evidence. Moreover, Archer's own testimony at trial was incriminating; not only did it put him at the store shortly before and shortly after it was robbed, but various of his denials were contradicted by his own witnesses or were otherwise not credible. Substantial, competent evidence supports the trial court's determination that Bonifay's recantation was not credible and that Archer had failed to demonstrate a reasonable likelihood that his new evidence would result in a different verdict on retrial.

2. The record supports the trial court's rejection of Bonifay's claim that the state deliberately deceived the jury and the court by the presentation of known false evidence. While the jury may have been skeptical of certain parts of Bonifay's testimony (as both the prosecutor and defense counsel believed), Archer has failed to demonstrate that any part of it was false or that it was known to be false. If his testimony was not entirely true, it certainly was not "entirely false." Archer's jury was

fully informed of all factors relevant to its determination of Bonifay's credibility. Moreover, the State's case simply never turned on, and the State never relied on, that portion of Bonifay's testimony that he now contends (as he did at trial) was false (i.e., the briefcase full of money and Archer's threats). Archer has not demonstrated that presentation of "false evidence" undermines confidence in the verdict.

3. The record likewise supports the trial court's rejection of Archer's Brady claim with regard to Bonifay's prior burglaries. Although the State is required to disclose exculpatory information in its possession but unknown to the defense, the State was not in possession of records of the State of Mississippi burglary, and Bonifay's participation in that burglary was not unknown to the defense. Moreover, the details of Bonifay's participation in the Mississippi burglary were not material. His trial and resentencing counsel both testified that they would not have wanted to emphasize that Archer was associating with a party to a violent burglary.

Likewise, Archer has failed to demonstrate the suppression of evidence known to the State but unknown to the defense with regard to the involvement of State's witnesses, including Bonifay, in the All Pro Sound

burglary. Nor has Archer demonstrated materiality. In general, presentation of evidence about Bonifay's involvement in prior burglaries, one of which, like the Trout robbery/murder, was an "inside job," would have corroborated the State's theory that Archer had solicited Bonifay to do his dirty work. Evidence that Wynn had willingly participated in a prior burglary would have buttressed Wynn's testimony that he had declined to participate in the Trout robbery because the plan included murder. Evidence that Bland was involved in the All Pro Sound burglary could not have been used to impeach him because he did not testify. Finally, evidence of Barth's involvement in a prior burglary would have been minimally impeaching in light of his admitted involvement in the Trout robbery/murder.

ARGUMENT

ISSUE I

SUBSTANTIAL, COMPETENT EVIDENCE SUPPORTS THE
TRIAL COURT'S REJECTION OF ARCHER'S NEWLY
DISCOVERED EVIDENCE CLAIM

Archer contends here that Bonifay's recanted testimony entitles him to a new trial.⁶ There are two requirements that must be met before a new trial can be granted on the basis of newly discovered evidence. First, in order to be newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Jones v. State, 709 So.2d at 521 (Fla. 1998) (internal quotes and citation omitted). Secondly, the "newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Ibid. In making this determination:

[T]he trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The

⁶ Below, Archer alleged that testimony from Barth and Fordham also was newly-discovered evidence that would support a new trial. Archer does not renew these allegations on this appeal.

trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner.

Id. at 521-22 (internal citations omitted). Newly discovered evidence which merely constitutes impeachment evidence does not generally entitle a defendant to a new trial. Williamson v. Dugger, 651 So.2d 84, 89 (Fla. 1994); Buenoano v. State, 708 So.2d 941, 951 (Fla. 1998). Furthermore, recanted testimony is "exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true." Armstrong v. State, 642 So.2d 730, 735 (Fla. 1994).

The court below denied Archer's newly discovered evidence claim, finding that "the statements are not credible, and, if allowed at a new trial, would not change the outcome of the trial" (10R 1524).⁷

⁷ Archer devotes several pages of argument to Judge Jones' conclusion (10R 1524-25) that Bonifay's recantation does not qualify as newly discovered because the "facts" set forth in the recantation were known to Archer at the time of the trial. Initial Brief of Appellant at 49-51. Regardless of the correctness of this conclusion, however, the Court found that, "even assuming" the recantation

With the foregoing principles in mind, the State will address the alleged new evidence.

Some eleven and one half years after he testified at Archer's trial, Bonifay has now come forward to say that his testimony about Archer's involvement was a lie - that Archer did not solicit him to rob Trout or to murder its clerk.

It should be noted that, even now, Bonifay acknowledges that Archer had a problem with someone who had worked with him at Trout. He admits that he planned the robbery in advance and that he knew from talking to Archer that the only way he could get money out of the store was to rob it while the clerk was still there. He admits that Archer told him about the cash box and told him that the W Street store would have a considerable amount of money overnight as it was the drop off for all the Trout stores in the area. He admits that Archer told him what kind of part to ask for to get the clerk to go in the back, about the rear exit, and about the security cameras. But, he now contends for the first time, there was no plan to shoot the clerk.

qualified as newly discovered, "the Defendant fails to establish that the recantation would produce a different result at a new trial" (10R 1525). Because this conclusion is clearly supported by the record, as set forth above, Judge Jones' rejection may and should be affirmed.

There are several reasons why Bonifay's present testimony does not warrant a new trial for Archer. The length of the delay in coming forward is one factor diminishing Bonifay's credibility. Bonifay had the opportunity as early as Archer's resentencing to try to set the record straight and declined to do so. Instead, he waited more than 10 years to come forward with his present story. A second factor is that this is a recantation, which, as noted, above is by its nature "exceedingly unreliable." Further, although Bonifay claims he is finally unburdening his conscience, his present testimony is unabashedly self-serving; although ostensibly offered to help Archer, acceptance of his testimony that the murder was not planned in advance arguably would remove the CCP statutory aggravating from Bonifay's own death sentence.⁸

Aside from all this, however, Bonifay's present testimony that there was no plan to kill the clerk is not credible and fails to exonerate Archer. One thing that Bonifay cannot now explain, and Archer could not explain at his own trial, is why Bonifay would have told others about

⁸ The State has acknowledged that the recent case of Roper v. Simmons, 125 S.Ct. 1183 (2005) mandates that Bonifay, who was 17 at the time of the crime, must be resentenced to life. See State's Response to Order to Show Cause, filed May 3, 2005, in case No. SC04-675. At the time Bonifay testified in Archer's postconviction proceeding, however, he was still very much death eligible.

Archer's involvement and his desire to see the clerk get killed before the robbery even occurred. Bonifay also cannot explain how he could have known to tell the police that he had killed the wrong man if Archer had not told him so. Bonifay did not know either Wells or Coker, and he would not have known who was supposed to be working at the W Street store either night. Archer knew both Wells and Coker. Moreover, Archer spent 3-4 nights a week at the Highway 29 store and could have found out who was supposed to be working those nights. In addition, Archer had been by the W Street store shortly before the murder and had seen Coker there, and thus knew that Wells was not working that night as originally scheduled. There really is no source other than Archer for Bonifay's knowledge that he had murdered the "wrong man."

Moreover, there was strong evidence of Archer's guilt aside from Bonifay. First of all, the robbery at Trout is just too plainly an "inside job," committed by someone who had been told which store to rob, when and how to enter the store, where to go after he got there, how to get out, and how to eliminate the only possible witness. And Archer clearly was that inside man, as demonstrated not only by Bonifay's testimony, but (a) by Webber's testimony that Archer had told Webber the next day that he knew who had

done it because he had told them how, including shooting the clerk in the head - even though Webber had not told Archer that anyone had been killed, (b) Wynn's testimony that Bonifay asked him to help commit a robbery that Archer had solicited him to commit because he wanted one person killed, and (c) Barth's testimony that Archer had planned the crime. Not only do these witnesses all point the finger at Archer as the mastermind of this crime, but there is no plausible alternative candidate for the job. Furthermore, Archer's own testimony places him at the scene of the crime soon before and shortly after the murder, and his lack of concern upon seeing all the police cars and the crime scene tape at the very place where he had seen his "good friend" Wayne Coker working just an hour and a half earlier is inconsistent with his innocence. Likewise incriminating is his refusal to acknowledge that he knew before January 26 that the cash from all the Trout stores was left overnight at the W Street Store - a denial that was contradicted by his own witnesses, including his fiancé (who testified that Archer had told her he was going with Ed Bird to carry money to the W Street store), Ed Bird (who testified that Archer routinely went with him when he delivered money to the W Street store), and Rich Archer

(who testified that money from the other stores was kept at the W Street store, and that Ed Bird talked about it).

Archer's trial testimony that Bonifay had threatened him after he had refused to take Bonifay to get drugs is likewise non-credible. Archer's claim that he had refused only because his tag had expired and he did not "need to be on the highway," doesn't hold up; he admitted he had driven all the way to Daytona on the same expired tag. Furthermore, Bonifay's present testimony does nothing to discredit Archer's motive: Archer had been fired from Trout; Wells had something to do with it; Archer admitted in his own testimony that Bonifay knew that he and Wells did not get along; Archer admitted that he knew that Bonifay had committed a previous violent crime and wanted to kill someone to see what it was like; Archer described Wells as an "air-head" in his own testimony; and Bonifay in his latest testimony acknowledged that Archer thought one of the Trout clerks was an "asshole."

As Judge Jones noted in his sentencing order, it really does not matter whether Bonifay expected to get a satchel of money or the proceeds of the store, which he had been led to believe was considerable:

Whether payment was to be the money taken in the robbery or a satchel of money as claimed by Bonifay, Archer procured his cousin to kill the

store clerk. Archer planted the seed in Bonifay's fertile mind, he concocted the plan to gain entry to the store, he urged the use of ski masks to thwart the video and gloves to thwart identification, he disclosed the location of the cash box and suggested the need for bolt cutters to open it, and he designed the getaway through the emergency exit. He aided in securing a gun and in ensuring its delivery to Bonifay. . . . It was carried out just as he directed except the wrong man was on duty. Bonifay shot to death Billy Wayne Coker, believing him to be the clerk Archer had commissioned him to kill.

(ARS 141).

Bonifay's present, belated testimony is not credible and is insufficient to warrant a new trial or a resentencing. Jones v. State, 709 So.2d at 523. The record contains substantial, competent evidence supporting the findings of Judge Jones in his order denying relief on Archer's claim of newly discovered evidence. Johnson v. State, 769 So.2d 990, 1000 (Fla. 2000) (Court "will not substitute its judgment for that of the trial court on issues of credibility" so long as the determination is supported by substantial, competent evidence).

ISSUE II

JUDGE JONES CORRECTLY REJECTED ARCHER'S CLAIM THAT THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY

The gist of this claim is that Bonifay's testimony about having been threatened by Archer and having been

offered a briefcase full of money by Archer was false and the State knew it was false.

The State does not contest the general principle of law that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. United States, 405 U.S. 150 (1972). However, mere inconsistencies in testimony by government witnesses do not establish the knowing use of perjured testimony. U.S. v. Griley, 814 F.2d 967, 971 (4th Cir. 1987); Overton v. Texas, 450 F.2d 919 (5th Cir. 1971). While Bonifay's testimony about being threatened by Archer and about being offered a briefcase full of money might be inconsistent enough with other testimony and with the overall picture of the case established by consideration of all the evidence as to create a suspicion that neither event actually occurred, Archer has not proved in fact that Bonifay's testimony was perjured or that the prosecutor knew that it was perjury. In fact, Archer did own a gun and, although he did not have a job per se, he apparently was a drug dealer and had significant income. Moreover, the evidence supports the State's theory that Archer was a full party to this robbery

and murder, and, therefore, that he was certainly capable of threatening Bonifay.⁹

In any event, as Patterson pointed out, witnesses often do not give completely believable testimony. No case holds that the state can only present testimony that is completely credible. Maharaj v. State, 778 So.2d 944, 957 (Fla. 2000) (denying Giglio claim because although statement of witness was not "entirely true," neither was it "entirely false"). Further, this Court has repeatedly emphasized that "[t]he thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and the prosecutor not fraudulently conceal such facts from the jury." Ventura v. State, 794 So.2d 553, 562 (Fla. 2001) (internal quotes omitted). Nothing was concealed by the State here. Archer's jury was fully informed of all relevant factors that might call into question that testimony. Nor did Patterson ever try to tell the jury that Bonifay's

⁹ Archer emphasizes that Bonifay first mentioned the briefcase and the threats in his testimony at Archer's trial. While it is true that *specific* mention of these matters first occurred at Archer's trial, Bonifay did tell police long before either trial that Archer "was bitching" at him for failing to carry out his assigned task on Friday night (BT 258), that Archer told him to go back and finish the job (BT 258-59), and that he expected to get enough money "to where I wouldn't have to worry about anything else anymore" (BT 259).

testimony was credible in every respect. On the contrary, he expressly acknowledged in his own closing argument that portions of Bonifay's testimony were not credible.

In Patterson's view, it really did not matter if Archer threatened Bonifay or not. Even if the threat occurred, it was not why Bonifay committed the crime. And in fact, Archer's own testimony demonstrates that Bonifay was a "loaded gun," who had committed previous burglaries and who sought an opportunity to kill someone.

Even if error occurred, Archer has not demonstrated materiality. Neither Patterson nor trial counsel thought the jury believed Bonifay's testimony about the briefcase or the threat.¹⁰ In fact, both felt that such testimony helped the defense precisely because it was not credible

¹⁰ Archer notes in his brief that Patterson argued to Bonifay's jury that Bonifay was fully capable of committing this crime without having been threatened, and suggests that Patterson's Bonifay and Archer closing arguments are inconsistent. Archer also argues that Patterson "knew" the testimony was false, noting his testimony at the evidentiary hearing that "I did not believe that's why this crime was committed." Initial Brief of Appellant at 72-73. Of course, that a threat occurred does not mean the threat was Bonifay's primary motivation. Furthermore, skepticism is not knowledge, and Patterson's testimony establishes neither that the testimony was false nor that Patterson "knew" it was false. Moreover, Patterson never argued to Archer's jury that it should believe Bonifay's testimony about the threats or the briefcase full of money, or that the State's case in any way relied on such testimony. Rather, he argued that the evidence proved Archer's guilt beyond a reasonable doubt without consideration of that part of Bonifay's testimony.

and the jury did not believe it. Asay v. State, 769 So.2d 964, 983 (Fla. 2000) (noting that Giglio claims had been rejected where the witness had been impeached at trial).

Regardless of the credibility of this portion of Bonifay's testimony, his testimony implicating Archer is, in the main, not only credible, but corroborated by numerous other witnesses. Archer clearly provided Bonifay the inside information needed to commit the crime. Archer provided the murder weapon. Archer had the motive, the means and the opportunity to set the events of January 26, 1991 into motion and to cause the death of Billy Wayne Coker. Archer has not demonstrated that the presentation of "false evidence" undermines confidence in the guilty verdict. Id. at 563; Occhicone v. State, 768 So.2d 1037, 1042-43 (Fla. 2000). Judge Jones correctly rejected Archer's Giglio claim.

ISSUE III

JUDGE JONES CORRECTLY REJECTED ARCHER'S CLAIM
THAT THE STATE SUPPRESSED MATERIAL EVIDENCE

Archer contends that the State violated the tenets of Brady v. Maryland, 373 U.S. 83 (1973) by suppressing evidence concerning the burglary that Bonifay had committed in Mississippi and his participation in the "All Pro Sound" burglary. "When reviewing Brady claims, this Court applies

a mixed standard of review, 'deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing de novo the application of those facts to the law.'" Johnson v. State, 30 Fla. L. Weekly S207 (Fla. March 31, 2005) (internal cites omitted).

1. *The Mississippi burglary.* Archer contends the prosecutor violated Brady by failing to furnish to trial counsel any police reports concerning the Mississippi burglary that Bonifay was involved in. However, Lang clearly knew about the Mississippi burglary, as did Archer. In fact, Archer mentioned it in his own trial testimony. Archer has not shown that the State had any information about that burglary in its possession, or even knew about it before Archer mentioned it.

Absent a showing that the State knew more about the burglary than did the defense, and more particularly, that the State had in its possession any Mississippi police reports relating to this burglary, Archer cannot demonstrate any Brady violation. One of the elements of a Brady violation is that evidence was withheld by the state. Stewart v. State, 801 So.2d 59, 70 (Fla. 2001). The state cannot withhold that which it does not have. Brady and its progeny apply to evidence in the possession of the

government's "prosecution team," including investigative and prosecutorial personnel - in other words, "to information possessed by the prosecutor or anyone over whom he has authority." U.S. v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989).

The Mississippi records at issue here obviously were not such information, and nothing was suppressed. See also, Jones v. State, 709 So.2d 512, 520 (Fla. 1998) (declining to find that evidence was "withheld by the police" even though the witness charged with nondisclosure was himself a police officer, where he was not involved in the homicide investigation, his statements were not part of any documents or reports in the possession of the police, and he affirmatively testified that he had not told anyone about this information).

Further, Archer has not demonstrated how the nondisclosure of these records was prejudicial at either the guilt or penalty phases. Sentencing counsel Kypreos did not want to emphasize the Mississippi burglary because he did not want to emphasize that Archer was associating with thugs. Moreover, although the Mississippi case might, as trial counsel Lang noted, tend to show that Bonifay was capable of doing the Trout crime on his own, proof that Bonifay had been involved in a violent crime in Mississippi

and was willing to use violence would have bolstered other testimony that Archer had recruited him to commit murder. As Kypreos noted, who would Archer have recruited - a boy scout or someone demonstrably willing to use violence?

2. *The All Pro Sound Case.* Archer contends that the State suppressed information about a burglary committed at All Pro Sound by Bonifay, Barth, Wynn, and Bland more than a month before the Trout murder. The State would first respond that Archer has not proved that this information was unknown to Archer or his trial counsel.

Archer himself was aware that Bonifay had committed at least some burglaries. Kypreos testified that he had discussed these burglaries with him, although he could not recall whether or not All Pro Sound was mentioned specifically. Moreover, Archer's own exhibit 9 shows that his father was questioned by police about whether Archer had purchased from Bonifay articles stolen in the All Pro Sound burglary. Finally, George Wynn was expressly asked about the All Pro Sound burglary when deposed by attorneys for all of Archer's co-defendants.¹¹

¹¹ Archer notes that his own counsel did not attend this deposition and that there is no express "due diligence" component of Brady. Initial Brief of Appellant at 94-95. The State does not disagree with either of these observations. Nevertheless, the burden was *on Archer* to prove that evidence was "suppressed." It was not

Archer has proved neither that he was unaware of the All Pro Sound burglary nor that the State failed to disclose police reports about this burglary to defense counsel.¹² Neither the prosecutor nor either of the defense attorneys could recall whether these reports were disclosed and the record is silent. We are left with speculation and supposition that the information was not disclosed, and that is not enough to satisfy Archer's burden to prove the suppression of favorable evidence. Gorby v. State, 819 So.2d 664, 678 (Fla. 2002) ("A mere stacking of inferences does not constitute a Brady violation.").

Even assuming, arguendo, however, that this information was not known to Archer or his counsel and was not disclosed by the State, Archer has failed to demonstrate materiality.

It should be noted, first of all, that the allegedly suppressed material must either be admissible or something that would have led to some admissible evidence. Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000).

"suppressed" if Archer already knew about it. Maharaj v. State, 778 So. 2d 944, 954 (Fla. 2000) ("Although the 'due diligence requirement is absent from the Supreme Court's most recent formulation of the Brady test, . . . a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld . . . simply because the evidence cannot then be found to have been withheld from the defendant.").

¹² Judge Jones made no specific finding as to knowledge or disclosure.

All Archer has presented are police reports and secondhand testimony from police officers about statements they took from the participants. This is all hearsay, not substantively admissible itself. We have not heard from any of the actual participants about this crime, and Archer has not demonstrated by any other means that the disclosure of this report would have led to admissible evidence.

But even if any of this somehow would have been admissible, it still is immaterial, as Archer has not demonstrated how either trial or sentencing counsel could effectively have used it. As with the Mississippi case, proof of Bonifay's involvement in a prior burglary, especially one that, like the Trout murder, appeared to be an "inside job," would corroborate the State's theory that Archer had solicited this experienced burglar to do its dirty work for him.

In addition, while proof that Wynn willingly had become involved in a nonviolent burglary and had pending charges from that burglary when he testified at Archer's trial might have helped discredit him to some extent, what such proof would also have done is corroborate Wynn's testimony that he declined to get involved in the Trout case because Bonifay had told him that Archer wanted "one person" killed because he had problems with him at work.

Proof that Bland was involved in the prior burglary could not have been used to impeach him for the very simple reason that he was not a witness in the Archer case, at either the guilt or the penalty phase.

Finally, when Barth testified at the guilt phase, he was facing a murder charge arising out of the Trout Auto Parts robbery/murder, and when he testified at the resentencing he had been convicted of murder and was serving a life sentence. Barth's pending All Pro Sound burglary charge was of minuscule importance in comparison to the pending murder charge which the jury was fully aware of at the guilt phase. At the penalty phase, Barth testified as a convicted murderer. Proof that he also had been convicted of a nonviolent burglary would not have added anything material to his credibility.

For all these reasons, any non-disclosure of information about the All Pro Sound burglary fails to undermine confidence in the judgment, and the trial court correctly denied this claim.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sara K. Dyehouse, Esquire, 3011 Richview Park Circle, Tallahassee, Florida 32301, this 21st day of July, 2005.

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